

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BEIJING ZHONGYI ZHONGBIAO)	C13-01300-MJP
ELECTRONIC INFORMATION)	
TECHNOLOGY CO. LTD.,)	SEATTLE, WASHINGTON
)	
Plaintiff,)	October 22, 2013
)	
v.)	Motion Hearing
)	
MICROSOFT CORPORATION,)	
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 THE CLERK: This is the matter of Beijing Zhongyi
2 ZhongBiao Electronic Information Technology Company v.
3 Microsoft Corporation, cause number C13-1300-MJP. Counsel,
4 please make your appearance.

5 MR. McCLANAHAN: For the plaintiff, Your Honor, Randy
6 McClanahan and Chad Ihrig.

7 THE COURT: Good afternoon.

8 MR. McCLANAHAN: Good afternoon.

9 MS. DORAN: For the defendant, Ambika Doran.

10 MR. RUMMAGE: Steve Rummage, Your Honor, for
11 Microsoft Corporation.

12 THE COURT: Counsel, I've had an opportunity to read
13 your briefing that you filed in the Western District of
14 Arkansas. I've also had an opportunity to read your
15 supplemental briefs that I asked for specifically asking for
16 the application of Ninth Circuit law. And I hope that you
17 received the questions that I put out yesterday that I'd like
18 to have you respond to during the course of your argument.

19 So, if you're ready to begin, I believe that we allotted
20 20 minutes per side.

21 MR. McCLANAHAN: Do you want the plaintiff to begin,
22 or Microsoft, since it's their motion we're here on?

23 THE COURT: Well, it's Microsoft's motion, they have
24 the privilege of going first.

25 MS. DORAN: Thank you.

1 Good afternoon.

2 THE COURT: Good afternoon.

3 MS. DORAN: I am going to briefly give you an
4 overview, and then during the course of the argument I'll
5 answer the questions that were posed in the court's e-mail
6 yesterday. And I'm hoping to reserve seven minutes for
7 rebuttal. And I hope Your Honor has a copy of the exhibits.

8 THE COURT: I do.

9 MS. DORAN: Okay. Zhongyi brings this action against
10 Microsoft nearly 20 years after the parties signed the
11 applicable license agreement governing the use of certain
12 Chinese language fonts. Microsoft's use of the fonts was no
13 secret, it's the world's largest software manufacturer, and
14 the fonts appeared in certain versions of its Windows
15 operating system. Anyone can buy that software.

16 The parties agree that a 1995 font license agreement
17 governs this dispute. The court should interpret the license
18 as a matter of law to dismiss Zhongyi's claims. This
19 conclusion follows from two points. First, the license
20 grants Microsoft to use the fonts in any products. It
21 contains no language limiting the grant to Windows 95, as
22 Zhongyi contends. Second, the court need not and should not
23 defer to the Chinese court's contrary interpretation of the
24 contract.

25 With respect to the first point, the license agreement, if

1 you'll look at page two of the exhibits, this is Section
2 11.1, the font license agreement. And it states that this
3 agreement is governed by the laws of the State of Washington.
4 There is no dispute that as a general matter a choice of law
5 clause is enforceable.

6 Thus, the court has to look to Washington contract law to
7 interpret the contract. Washington courts interpret the
8 words of a contract according to their ordinary meaning and
9 from an objective standpoint. And if you look at the next
10 exhibit, page three, in *Hearst Communications v. Seattle*
11 *Times Company* the Washington Supreme Court confirmed this
12 stating, "We attempt to determine the parties' intent by
13 focusing on the objective manifestations of the agreement."

14 THE COURT: Counsel, can you slow down for me,
15 please. I'm not going to get a good record on you.

16 MS. DORAN: Okay. In *Hearst Communications v.*
17 *Seattle Times* the Supreme Court stated, "We attempt to
18 determine the parties' intent by focusing on the objective
19 manifestations of the agreement, rather than on the
20 unexpressed subjective intent of the parties. We do not
21 interpret what was intended to be written but what was
22 written."

23 For example, in *Warner v. Design and Build Homes* the
24 Washington Court of Appeals interpreted a contract in which
25 the plaintiffs agreed to purchase property, "In its present

1 as-is condition." The court rejected the claim for breach of
2 the warranty of habitability stating, "This court not only
3 should not but it cannot rewrite the clear agreement of the
4 parties."

5 These principles require dismissal of Zhongyi's complaint
6 because the license unambiguously permitted the allegedly
7 infringing conduct. The license grant, which is Section .2
8 of the agreement, in it Zhongyi grants to Microsoft a
9 perpetual, non-exclusive, worldwide, irrevocable license to
10 use, modify, translate and create derivative works based upon
11 the fonts; and reproduce, distribute or license (directly or
12 indirectly), or sell, rent or lease copies of the fonts
13 and/or derivative works thereof.

14 There is no condition in these grants that the fonts be
15 used in a particular product. Were there any doubt,
16 Subsection 3 says that "Microsoft may do any other act in
17 order for it to engage in the full commercial exploitation of
18 any licensed product."

19 Section 1 of the agreement defines licensed product as
20 "Each Microsoft software product into which the fonts are
21 integrated." This, again, contains no limit on what kind or
22 version of software product can incorporate the fonts.

23 The court asked in its e-mail yesterday whether there were
24 any limits on Microsoft's potential use of the fonts. The
25 short answer is no. There are no limits in the license

1 grant. That being said, there is evidence suggesting that
2 the parties contemplated that Microsoft would continue to use
3 the fonts.

4 Section 3.3 of the font license agreement contains a cap
5 on the price after which the license grant shall, "Be royalty
6 free." Thus there was some use, without payment,
7 contemplated by the parties.

8 In addition, the 1995 agreement was designed to make the
9 fonts comply with certain specifications promulgated by the
10 Chinese government. The government amends those
11 specifications from time to time. And, in fact, although
12 this is not on the record on this motion, it was on the
13 motion to transfer earlier in the case, the parties signed an
14 agreement in 2001 when the standard changed. Thus, the
15 agreement was only contemplated for the period of time within
16 which the font specification was in force, and it would have
17 become obsolete within a certain period of time.

18 This is typical of Microsoft's practice with respect to
19 licensing fonts, which is in part designed to avoid the
20 hassles of having an audit provision. And, in fact, there is
21 no audit provision in this license agreement, suggesting that
22 the license grant itself was unlimited.

23 Section 11.2 of the agreement --

24 THE COURT: By "audit provision" you mean --

25 MS. DORAN: I mean a provision allowing Zhongyi to

1 investigate Microsoft's use of the fonts and whether it
2 exceeded the scope of the license.

3 THE COURT: So there would be a lot of beans to be
4 counted if you had to count every time Microsoft was going to
5 use this.

6 MS. DORAN: Correct.

7 THE COURT: While we're stopped, let me ask you one
8 other question.

9 MS. DORAN: Sure.

10 THE COURT: The fonts themselves, I understand, are
11 Chinese characters, the same way you would have alphabet
12 characters in English. But what you're really licensing is
13 the computer program that creates those letters; am I
14 correct?

15 MS. DORAN: It's a more complicated question, because
16 what will be at issue, if this case continues, is what is the
17 subject matter of Zhongyi's copyright? And there is an open
18 question under U.S. copyright law, whether typeface and fonts
19 are protected under copyright law. So to answer your
20 question, I believe what is being licensed is the typeface.
21 How it is transmitted to Microsoft would be in the form, I
22 believe, of software coding. Although, I have a limited
23 understanding of software code myself.

24 THE COURT: So in the United States you wouldn't be
25 able to have a proprietary interest in the font itself. You

1 would be able to have an interest in the code that wrote the
2 font.

3 MS. DORAN: I believe that is correct.

4 THE COURT: Okay. And apparently in China, you're
5 saying, that they were purchasing the appearance of the image
6 itself.

7 MS. DORAN: I'd have to look at the agreement more
8 closely. I'm not entirely sure, to be honest with you. I do
9 think that the Chinese courts certainly found that the fonts
10 were protectable as a matter of Chinese copyright law. And I
11 don't know and I don't necessarily think that would be the
12 answer under U.S. copyright law.

13 If you turn to the next page of the exhibits, page five,
14 this is Section 11.2 of the agreement. And it states that,
15 "This agreement is the entire agreement regarding its subject
16 matter, and supersedes any prior agreements among the parties
17 relating thereto." This means the court cannot and should
18 not consider the memorandum of understanding or the
19 supplemental memorandum of understanding.

20 The court asked in its e-mail yesterday also whether it
21 could convert this motion into one for summary judgment and
22 what else would need to be considered. Microsoft's position
23 is that it's entirely unnecessary. The court need only look
24 at the complaint and the agreement, which is incorporated by
25 reference into the complaint, to decide the motion.

1 But even if this were a summary judgment motion, Microsoft
2 would ask the court to consider the same evidence.

3 THE COURT: Well, can't you extend that and say the
4 MOUs are part of the complaint itself? In other words, are
5 they referenced in the complaint?

6 MS. DORAN: I believe they are referenced, but I
7 would -- I'm sorry.

8 THE COURT: So, what I'm really asking in my question
9 is don't I have everything necessary in order to convert this
10 to a summary judgment? In other words, I've got the contract
11 and I've got the MOUs. It's a simple question of what did I
12 consider? Both sides have got the documents in front of me.
13 Why do you use the 12(b)(6) standard rather than the summary
14 judgment standard? I mean, it's a harder burden of proof for
15 you.

16 MS. DORAN: Right. I understand that. I would say
17 that we believe, yes, you have everything that you need in
18 front of you, the complaint and the agreement. We don't
19 think there's any need to look at the MOU or the supplemental
20 MOU. To the extent the court believes it ought to be looking
21 to extrinsic evidence, it's possible that if Zhongyi provided
22 some additional evidence we might want an opportunity to
23 rebut that evidence.

24 THE COURT: But aren't I in a position right now to
25 say, okay, I've got all the documents under Washington law,

1 you know, I've got the MOU, but I don't look at the MOU.
2 Why wouldn't you want the summary judgment ruling rather than
3 the 12(b)(6) ruling, which is a harder standard for you to
4 meet?

5 MS. DORAN: We would like either ruling. You know,
6 you do have what we think you need to decide a motion for
7 summary judgment or a motion to dismiss.

8 THE COURT: Well that's what I'm trying to find out,
9 if there's some secret reason I'm not thinking of as to why
10 you don't want the summary judgment and are arguing so hard
11 that I don't have all the documents in front of me.

12 MS. DORAN: No, I'm not trying to say you don't have
13 the documents in front of you. You absolutely do have them.

14 THE COURT: Go ahead. Thank you.

15 MS. DORAN: With respect to the Chinese court
16 decisions, they have no bearing here. It's well established
17 that U.S. courts are not obliged to recognize judgments
18 rendered by a foreign state. The plaintiff has provided no
19 cases suggesting otherwise.

20 Most cases Zhongyi cites discuss the enforceability of
21 money judgments against U.S. defendants. But Zhongyi does
22 not seek to enforce a Chinese judgment which addresses
23 Chinese copyright law. Instead, it's trying to use a Chinese
24 judgment on a Chinese copyright law to resolve issues for a
25 claim under U.S. law. Some of the cases discuss collateral

1 estoppel, but those cases do not require the court to be
2 bound by the Chinese decisions. And in any event, the issues
3 here are not identical. Again, the question here is whether
4 under U.S. copyright law Microsoft infringed the plaintiff's
5 copyright. The decisions in China decide, as a matter of
6 Chinese law, whether Microsoft infringed the plaintiff's
7 copyright. Copyright laws do not have extraterritorial
8 application.

9 Even if the court were to look to the Chinese decisions,
10 it should not defer to them. The Chinese court failed to
11 apply Washington law and ignored the plain language of the
12 contract.

13 Page six of the exhibits is a portion of the Beijing High
14 Court's decision in which it says, "When both parties dispute
15 the scope of any Microsoft product, agreed in a font
16 agreement of 1995, the cognitive abilities and duties of care
17 of all parties to the agreement should be comprehensively
18 considered, and the judgment should be made in accordance
19 with the basic principles of copyright law."

20 Thus, the court considered the "cognitive abilities and
21 duties of care," merely because the parties disputed the
22 scope of the agreement, not because it found any ambiguity in
23 the license's terms.

24 Even if the court does look at the MOU or the supplemental
25 MOU, they do not change the proper result here. Zhongyi was

1 not a party to either the MOU or the supplemental MOU, and so
2 they cannot have any bearing or be any evidence of the 1995
3 agreement. Neither the MOU nor the supplemental MOU have any
4 limiting language whatsoever. And, in fact, the supplemental
5 MOU in Appendix A supports Microsoft's interpretation. In
6 essence, Zhongyi is asking the court to imply a limit in
7 these memoranda, to which Zhongyi was not even a party, and
8 then incorporate that limit into the fully-integrated 1995
9 font license agreement, to vary the terms of that agreement.

10 In any event, the Chinese Supreme Court is looking now at
11 Microsoft's application for a retrial and has asked for
12 briefing on what would happen under Washington law. The
13 court should enforce the terms of the contract. The Chinese
14 judgment has no bearing on what the contract means under
15 Washington law. The court can and should dismiss the claims
16 as a matter of law.

17 THE COURT: Thank you.

18 MR. McCLANAHAN: Your Honor, under the local rules I
19 understand I need your permission to use a laptop. I'm told
20 I had to, is that okay?

21 THE COURT: Nobody has asked me for that before.

22 MR. McCLANAHAN: I asked your courtroom deputy or
23 somebody in here earlier. She said it would be okay.

24 THE COURT: Well, then obviously you got a higher
25 ruling.

1 MR. McCLANAHAN: No, I'm trying to abide by the rules
2 that I thought I carefully read, that's all, Your Honor.
3 Randy McClanahan for the plaintiff. Thank you for your time
4 this afternoon, and good afternoon.

5 This is really a simple case. I want to start off by
6 following something that she said in the very first slide
7 where she says, "This agreement is governed by the laws of
8 the State of Washington." It goes on to say, "And the
9 parties hereby consent to the jurisdiction of the state and
10 federal courts in the State of Washington," which Microsoft
11 has referred to as a forum selection clause in their briefing
12 to the court.

13 Interestingly, and I do agree with her when she says that
14 Microsoft, as we all know, is a big company, maybe the
15 biggest in the world. They know what they're doing. And
16 they didn't appear and litigate in China by accident.
17 Microsoft could have asked the Chinese court to stay
18 everything and do the litigating in Washington where
19 everybody had agreed was a forum. And they didn't do that.
20 Nor did Microsoft ever raise anything about Washington law in
21 the trial court in Beijing .

22 What they did was they made all the same arguments in
23 China that they have made before Your Honor, and they lost.
24 But can you imagine what would have happened if they had won?
25 They would not be here saying, oh, we can't give any full

1 faith and credit, or recognize, or whatever we want to
2 ultimately call it, the China judgment. They would say,
3 you're bound by it, Zhongyi, you lost.

4 So Microsoft wants two bites at the apple where they had
5 carefully considered -- we all know they've got access to the
6 best lawyers in the world, everywhere in the world, and they
7 decided they wanted to litigate this in China. And they
8 lost. And now they're trying to find a way out of that.

9 It's a little bit like the *Robinson Helicopter* case that
10 we cited, where in another case in the Central District of
11 California a company was sued by a Chinese company, an
12 American company was sued. And they said, no, forum non
13 conveniens, send it to China. Which they did, the judge did
14 that. The case went to China and was decided adversely to
15 the American defendant. They came back and the American
16 defendant asked the court to enforce the judgment. And the
17 court did enforce the judgment.

18 It's very much the same thing in this case. It's
19 obviously not technically a forum non conveniens situation,
20 but Microsoft could have litigated in Washington and chose
21 not to. They could have raised Washington law and chose not
22 to.

23 THE COURT: Well, I asked you this in one of my
24 questions. I'll ask it again. So what? In other words, you
25 tell me that that has significance, that they have waived

1 their right to raise the forum selection clause again --

2 MR. McCLANAHAN: Well, the only significance -- I'm
3 sorry.

4 THE COURT: But you don't cite me any case law to
5 that effect.

6 MR. McCLANAHAN: That would be one of the three
7 questions that you had asked. And I will answer it this way:
8 You had asked us, question three, you said: You claim
9 Microsoft has waived the choice of law by not raising it in
10 China but providing the citation. We address this at pages
11 21 to 26 of our response to defendant's motion to dismiss
12 filed November 1, 2012, Document No. 37.

13 And we said, in that brief we talked about Eighth Circuit
14 law. We cited a case -- that's when the case was in Arkansas
15 -- we cited to a case called *Dayton v. Gilman* which said,
16 "Ignoring a provision in a contract will constitute waiver if
17 the party whom the provision favors continues to exercise his
18 contract." And then --

19 THE COURT: Hold on. Show me where it is that you're
20 referring to.

21 MR. McCLANAHAN: It's in Document No. 37, page 24.
22 "See *Dayton v. Gilman*." And we quoted, "Ignoring a provision
23 in a contract will constitute waiver." Et cetera, et cetera.

24 And then, to answer the court's question last night we
25 found --

1 THE COURT: Well, wait a second, though. The issue
2 is, is what does Chinese law say about, if you don't raise it
3 you've waived it?

4 MR. McCLANAHAN: I don't have the answer to that. I
5 would defer to the Chinese court.

6 THE COURT: Isn't that one of the issues that's
7 really important, because they may have raised the forum
8 selection clause on their appeal?

9 MR. McCLANAHAN: I have read the arguments that were
10 made in the Chinese courts. And I have read the decisions of
11 the Chinese courts. And the point that was made there is
12 that they never offered any distinction to show that China
13 law would be any different than Washington law. And, in
14 fact, in their argument to the Supreme Court recently, the
15 judge indicated, well, it looks like it's the same thing to
16 me. We obviously don't have an opinion yet. But my point is
17 that Microsoft has not shown that there even would be any
18 difference between China and Washington law. So we're
19 focusing on a point that I think probably is not the moving
20 point there.

21 THE COURT: Okay. Well, let me back up here. You
22 cite to me Eighth Circuit law that basically says you either
23 raise it or you waive it. That's U.S. Eighth Circuit law.

24 MR. McCLANAHAN: That's true. And I have a Ninth
25 Circuit case as well.

1 THE COURT: How do you know that that rule -- I'm
2 assuming, was this an international case where somebody
3 didn't raise it?

4 MR. McCLANAHAN: No, Your Honor, it's just a case of
5 American law. I thought that that's what you were looking
6 for in the question that you raised.

7 THE COURT: No, I was not looking for American law.
8 Well, perhaps I was looking for American law that says in a
9 forum outside the country you have to use it or waive it.
10 But is the rule inside the United States or does it apply
11 extraterritorially? I don't know of any cases that say --
12 I've never run across this before -- that if you're
13 litigating internationally, that you have to raise
14 internationally every issue that you would raise inside the
15 local forum.

16 MR. McCLANAHAN: Nor do I, Your Honor. I don't know
17 it either. And I would simply defer to whatever the Chinese
18 court ultimately ends up saying about that issue.

19 THE COURT: Well that's what I was asking you for.
20 You seemed to be very certain in your footnote, or in your
21 briefing, that somehow they had waived it. And I don't know
22 how you can say that unless you know what the rules are in
23 China.

24 MR. McCLANAHAN: I don't know what the rule is on
25 that point in China, Your Honor.

1 THE COURT: Okay. Go ahead.

2 MR. McCLANAHAN: So, the interesting thing -- now
3 that we've talked about Microsoft choosing to litigate in
4 China, and losing in China, we go to the question that I
5 think was talked a little bit about, and Your Honor mentioned
6 this MOU.

7 We've got to remember, I think, the overarching thing here
8 is that in order for intellectual property in China to be
9 exported out of China to somebody like Microsoft to get to
10 use on a worldwide basis, it has to be approved by the
11 Chinese government. The Chinese government in the MOU set
12 forth the boundaries.

13 One of the interesting metaphors that was used in the
14 argument in the China Supreme Court talks about a bug in a
15 jar. They say, if you have a bug in a jar, the jar defines
16 the boundaries that the bug can jump to. The bug may want to
17 jump up, down, or sideways. But it can't get out of the jar.
18 And the jar here, the MOU, the jar that the government of
19 China created was a license limited to Windows 95.

20 Now, in fact, even the license fees that were collected by
21 Zhongyi and paid by Microsoft were specified by the
22 government. So to suggest -- when Microsoft suggests that
23 for some reason this '95 license agreement ought to be looked
24 at by itself and not in the context of the government MOU
25 which defines the jar, which defines the limits of what can

1 be exported, which defines the extent to which Microsoft is
2 allowed by the government of China to get this license, can't
3 be done. It has to be done in context.

4 And obviously the decisions about the use of extrinsic
5 evidence go one way and the other. They've got their cases.
6 We've got ours. And the case that we have cited to the
7 court, the Supreme Court of Washington in the *Berg v.*
8 *Hudesman* case, basically says what the court always needs to
9 do is to determine the intent of the parties. And when you
10 look at -- that's exactly, by the way, what the Chinese court
11 has done. They've said, if you look at the whole context of
12 the transaction, beginning with the MOU and the supplemental
13 MOU, the intent of the parties was only to license Windows
14 95.

15 Now, a couple of your other questions that I wanted to be
16 sure that I answer before we run out of time, you've asked
17 about what evidence would be needed if you did convert this
18 12(b)(6) motion into a motion for summary judgment. And I
19 think that that is the second question. Because the evidence
20 that I can think of -- for example, if this were to be
21 converted into a motion for summary judgment, we would ask to
22 file a cross motion for recognition of the Chinese judgment.
23 And the evidence that I was thinking about just kind of while
24 I was listening off to myself, the sort of things I think
25 would be helpful to the court, yes, certainly all of the

1 written materials that you mentioned today like the MOU and
2 the supplemental MOU and that sort of thing. But I think
3 also declarations of fact witnesses would be helpful to the
4 court. I think that perhaps declarations of an expert would
5 be helpful to the court. In the recognition of a foreign
6 judgment there are five factors that need to be considered by
7 the court. And we would like to present those five factors
8 to the court.

9 THE COURT: Well, let's talk a little bit about
10 whether you have a foreign judgment. Because that was one of
11 my other questions. You say on page two, Footnote 2 in your
12 briefing, that you've got a final and enforceable judgment,
13 but you don't give me any citation to that. How do I know?

14 MR. McCLANAHAN: That was your question number one of
15 yesterday, as I understand it. In plaintiff's motion for
16 leave to amend responses to defendant's motion to transfer
17 and dismiss, which is document No. 46, filed on April 29,
18 2013, at page four, we state, "In the final and enforceable
19 judgment issued by the Higher People's Court regarding the
20 Chinese appeal and how it relates to this litigation, the
21 Higher People's Court replaces the previous judgment entered
22 by the intermediate court, which is the trial court, and that
23 has a provision in it, the judgment of the Appellate Court
24 has a provision at the end of it that says "The judgment is
25 the final judgment."

1 Now, there's also something we cite in that same document
2 from the civil procedure law of the People's Republic of
3 China in which we cite -- we quote from that where it states
4 "The judgments and rulings of the people's court of second
5 instance" which is the Appellate Court here, "shall be
6 final." And that's Civil Procedure China Article 178, which
7 says "Any party that considers a legally effective judgment
8 or ruling to be faulty may apply to the intermediate superior
9 people's court for retrial. Nevertheless, execution of the
10 judgment on ruling shall not be suspended in the meantime."
11 And then we cite some commentators and some books that are
12 commenting on that very law.

13 And also, Your Honor, we have pointed out to the court in
14 Document No. 72 that was filed on September 16, 2013, that
15 there is a notice regarding acceptance of execution and it
16 provides that the judgment "has entered into legal force."

17 So, the civil procedure law of China is that the decision
18 of the Appellate Court, which has now been rendered, is a
19 final judgment. It is true that Microsoft has appealed to
20 the Supreme Court in Beijing. As I understand the status of
21 the procedure, they haven't yet decided if they're going to
22 take the case. It seems to me like it's something like a
23 writ of certiorari that would be over here. I don't know,
24 I'm not representing China law to the court. But we do have
25 a final judgment. And I know that in America when you have a

1 final judgment of a trial court, for example, it stays a
2 final judgment until something above it happens to reverse
3 it. So that's the authority that we have cited in our
4 earlier papers in this matter regarding that.

5 And back to your other question about the evidence. I
6 think it may also be useful to the court to read the briefs
7 and the arguments that were made in the China court.
8 Microsoft says a lot of things on the record that I think
9 frankly are contrary to some of the things they're saying in
10 this court today.

11 But the point I want to make that supersedes all of that
12 is that this is not necessary to do if the court decides to
13 recognize the Chinese judgment. For example, if the court
14 decides to recognize the Chinese judgment, all of that work
15 has already been done. The court has already examined all of
16 these arguments that Microsoft has made. The court has
17 considered the effect of the MOU. The court has considered
18 the effect of the language used. The court has considered
19 all of the arguments that Microsoft has made, and rejected
20 them. And if you are going to recognize that judgment, we
21 would respectfully submit that that would perhaps be the best
22 first thing for the court to decide in this case. Because if
23 you do decide to recognize the Chinese judgment, then we
24 don't need to go through all of those contorted efforts to
25 figure out, yet again, what was going on with those

1 agreements.

2 And, in fact, the case law that talks about recognition of
3 foreign judgments says that the reason we do this in the
4 appropriate circumstances is to prevent re-litigation of
5 issues that have already been litigated.

6 And to be very specific with the court, Your Honor, what
7 we're asking for here is very much like a collateral
8 estoppel. We're saying that we're suing Microsoft for
9 copyright infringement under the U.S. Copyright Act. So
10 elements of the proof are going to be, did we have a
11 copyright, for example, did they infringe the copyright, and
12 what are the damages going to be?

13 They're coming up with a defense. They say, well, we've
14 got a license. And we say, you're collaterally estopped.
15 You can call it issue preclusion. Different courts talk
16 about it using different terms. But that issue, the issue of
17 whether or not Microsoft has a license has been decided in a
18 case that Microsoft appeared in, fought hard for, and lost.
19 They are precluded now from relitigating that point.

20 So, we come into your court in a copyright --

21 THE COURT: But where do you get the authority for
22 that? In other words, operating internationally, does the
23 preclusion or the estoppel cross international boundaries?

24 MR. McCLANAHAN: Yes.

25 THE COURT: All right. Well, what if I basically

1 say, all right, you've got a Chinese judgment, but the
2 Chinese court got it all wrong, because they should have been
3 applying Washington law. And if they applied *Berg v.*
4 *Hudesman* and its progeny you don't get to the MOUs, because
5 there isn't anything ambiguous about the contract itself.

6 MR. McCLANAHAN: Well, in that particular case, for
7 example, the one that you just mentioned, the *Berg v.*
8 *Hudesman* case, the court says there that it's not talking
9 about deciding if the writing is unambiguous and then not
10 going outside the four-corners of the document. What the
11 court says in the context rule, it says that, "We now hold"
12 -- this is the Supreme Court of Washington en banc -- "We now
13 hold that extrinsic evidence is admissible as to the entire
14 circumstances under which the contract was made as an aid in
15 ascertaining the parties' intent."

16 THE COURT: Counsel, what I'm going to tell you is
17 that *Berg v. Hudesman* has been around for probably my entire
18 legal career and it's not quite as easy as that quote. There
19 is a huge body of litigation that came out of that case. And
20 to go back to simply quoting from it really doesn't keep up
21 with where Washington law has gone.

22 MR. McCLANAHAN: Which is why, Your Honor -- and
23 there are a number of cases out there talking about giving
24 effect to foreign judgments that say, it is not necessary or
25 even necessarily important that the foreign law be the same

1 as the American law.

2 For example, recognition of foreign judgments requires
3 that there be considerations of due process in the foreign
4 country.

5 The cases have said that by definition no country's laws
6 are going to be exactly like ours. No country's concepts of
7 due process are going to be exactly like ours. The way that
8 a country applies its own law, as long as it meets overall
9 fairness and concepts of justice, is enough. And we've got
10 to respect that country's decision of applying its own law
11 even though it may be different from our own law.

12 My point is simply that to let Microsoft go into China and
13 litigate, on purpose, these issues in China, not even raise
14 Washington law, hoping to win and then preclude us from being
15 able to attack it later on, and then have them lose and come
16 in and say: Oh, King's X, never mind, it doesn't matter, we
17 get a second bite at the apple. That's not what the concept
18 of recognition of judgments is all about.

19 And the idea is to keep the court from having to retry an
20 issue that's already been tried. Even though there are going
21 to be differences, always, between the law of the foreign
22 forum and the law of the United States, there's always going
23 to be differences. But that's not the point that the cases
24 look at. The cases look at the extent to which they have due
25 process and meet these other factors that we've talked about.

1 I think I've answered all the court's questions that you
2 had asked us. I don't want to leave anything out. Does it
3 sound to you like I've answered them all?

4 THE COURT: Well, you've answered the ones that I
5 asked. But you're talking about two bites of the apple. If
6 we're talking about two bites of the apple, why are you here
7 asking for money when you didn't ask for it in China?

8 MR. McCLANAHAN: Because China does not have the
9 authority to award damages for violation of U.S. copyright
10 law.

11 THE COURT: Why aren't you happy in litigating in
12 that forum and deciding that's all you get?

13 MR. McCLANAHAN: Because we want to sue them for
14 damages over here and we also want to get the injunction
15 enforced. Microsoft is obviously not honoring what the
16 Chinese court has ordered it to do. They're continuing to do
17 exactly what they've been doing. And we're going to need to
18 have a court in the United States to order them to stop these
19 products that are infringing our copyrights.

20 THE COURT: So everybody needs two bites of the
21 apple?

22 MR. McCLANAHAN: No, Your Honor. We're not asking
23 for a second bite of the apple, we're asking you to enforce
24 the judgment that was issued in China. We litigated and won.

25 THE COURT: But you're asking for more than that.

1 You're asking for money damages. You're not asking just for
2 an injunction. I mean, you could have come to Washington and
3 litigated all those issues. And you didn't. And so to say
4 that Microsoft is getting two bites of the apple, when you're
5 doing exactly the same thing, because you're asking for a
6 different package of relief, that argument doesn't go very
7 far.

8 MR. McCLANAHAN: Well, I understand what you're
9 saying. And with respect, the Chinese court does not have
10 authority to award damages for violation of the American
11 copyright laws.

12 THE COURT: Right, just like the Chinese court
13 doesn't have authority to make Microsoft stop doing what
14 they're doing.

15 My next question to everybody is, okay, let's assume
16 Microsoft wins here. Then what has Microsoft got? Do they
17 keep producing their products using the Chinese characters,
18 and make them out in Redmond, and wait for them to be
19 bootlegged into China? Because I assume the Chinese are
20 going to stop them at the border.

21 MR. McCLANAHAN: Well, it's going to be an
22 interesting problem if the Chinese court rules one thing and
23 the American court rules another thing. That's why we think
24 the American court should recognize the judgment in China,
25 which is the way, I think, the international system is set up

1 to work.

2 THE COURT: Well, the international system honors
3 certain types of judgments. In particular, when you're
4 talking about copyrights, it doesn't go very far outside the
5 borders.

6 MR. McCLANAHAN: And, again, we're not talking about
7 recognition of extraterritorial effects of copyrights. We're
8 talking about an issue, a factual issue, did Microsoft have a
9 license to do what they've done? That's the issue. It's a
10 fact that has been adjudicated and found against them.

11 THE COURT: So why did it take so long for you to
12 litigate in China when you're long past the initial Windows
13 releases that is what you say is all they were bargaining
14 for.

15 MR. McCLANAHAN: Well, the China case was filed what,
16 Chad, back in 1996? Over a decade ago. A long time ago.

17 THE COURT: From 2007 to 2013 is not a decade.

18 MR. McCLANAHAN: I need to check the documents. I
19 think it was filed before that.

20 THE COURT: What I'm saying is from the time that
21 they signed the contract until the time that the suit was
22 initiated in China, Microsoft produced lots of products.
23 They're producing products every year. I can pretty much
24 count on the fact that every November, right before
25 Christmas, somebody is going to sue. It's a regular

1 business, because they want to release their next best thing.

2 So, you know, if you were really limited just to the
3 Windows 95, what took you so long to tumble to the fact that
4 this was not a perpetual license?

5 MR. McCLANAHAN: I don't have the answer to that
6 question right now. I can try to find it out for you, but I
7 don't know it right now and I'm not going to make something
8 up.

9 THE COURT: Okay. Thank you very much.

10 MR. McCLANAHAN: Thank you, Your Honor. Nice to meet
11 you.

12 THE COURT: Nice to meet you, too. All right. Any
13 rebuttal, please.

14 Oh, just an aside how in the world did this case get to
15 Texarkana, Arkansas.

16 MR. McCLANAHAN: Well, Your Honor, for one thing
17 Walmart can be sued there, as can Microsoft. And there may
18 be some people that are nervous about suing Microsoft in
19 their own backyard if they can help it.

20 THE COURT: That's pretty far from their backyard.

21 MR. McCLANAHAN: I'm talking about Seattle.

22 THE COURT: No. No. No. I'm talking about going
23 to Texarkana, Arkansas is pretty far from Microsoft's
24 backyard.

25 MR. McCLANAHAN: Walmart is located in Bentonville,

1 Arkansas. And venue is proper. It was transferred per
2 1404(a).

3 THE COURT: Well, I don't doubt that the venue was
4 proper. I was just curious, because I don't see many
5 transfers from Arkansas, to be perfectly honest.

6 MR. McCLANAHAN: Well, we're happy to be in your
7 court, Your Honor.

8 THE COURT: Okay. Very good.

9 Okay, counselor. Well, is the Chinese judgment final or
10 not?

11 MS. DORAN: I don't think it matters whether it's
12 final or not. The issue here is not whether the court should
13 enforce a Chinese judgment. The Chinese court decided
14 whether Microsoft, as a matter of Chinese law, infringed the
15 copyrights of the plaintiff. It's not about giving effect to
16 that judgment. It is about using that judgment in this court
17 to preclude Microsoft from arguing that under the contract in
18 accordance with the Washington law choice of law provision
19 and under U.S. law Microsoft did not infringe Zhongyi's
20 copyright.

21 The full faith and credit clause does not apply in the
22 international context. And as you pointed out, there are no
23 cases that they have cited that require the court to defer to
24 China. It is definitely a matter of the court's discretion.
25 And it's something that when you look at it, you have to look

1 at what's fair and reasonable. That's what the principles of
2 comity dictate. It is patently unreasonable for the Chinese
3 court to have failed to enforce the Washington choice of law
4 provision and to have read into the contract terms that
5 simply aren't there.

6 With respect to what the contract says, and the Parole
7 Evidence Rule, *Berg v. Hudesman*, as you've said, has been
8 litigated extensively since that time. And in *Hearst v.*
9 *Seattle Times* the court explicitly said, "Our holding in *Berg*
10 may have been misunderstood, as it implicates the admission
11 of parole and extrinsic evidence. We take this opportunity
12 to acknowledge that Washington continues to follow the
13 objective manifestation theory of contracts."

14 And notably absent from Mr. McClanahan's argument was any
15 mention of what the license grant actually says, any mention
16 of the fact that it is, in fact, unlimited. We believe
17 that's enough for the court to grant Microsoft's motion.

18 With respect to the issue of waiver. The court is
19 correct, we have not located any cases suggesting that a
20 failure to raise an argument in a foreign court waives the
21 parties' ability to make that argument in the U.S. courts.
22 But moreover, this was not an issue that was waived or not
23 briefed in the Chinese court. The Chinese Appellate Court,
24 and this is in the record, did decide whether to enforce the
25 Washington choice of law clause. There was a lengthy

1 declaration submitted in the China litigation that cited
2 extensively to Washington case law. The Appellate Court
3 decided the choice of law issue, and the parties are now
4 briefing the choice of law issue before the Chinese Supreme
5 Court.

6 So if the question is whether it was waived in China,
7 plainly it was not. And even in the U.S., a challenge to a
8 choice of law can be made for the first time on appeal. And
9 we cited a case in our brief which is *Radiation Sterilizers*
10 *v. U.S.*, which is an Eastern District of Washington case from
11 1994.

12 Waiver is an equitable doctrine in any event, and it does
13 not bind the court. And given that the court in China
14 refused to enforce the parties' agreed choice of law
15 provision, equity requires that the court not find waiver
16 here. Thank you.

17 THE COURT: Thank you.

18 All right, counsel, I'll write for you on the topic. And
19 you should see an order coming out in ten days. So look for
20 it.

21 A couple of things: If this case keeps on going I'm going
22 to ask, please, that when you write for me, no footnotes. If
23 it's good enough to have me read, it's good enough to have it
24 in a font size that I can read. So there is one judge who is
25 a friend of mine who basically said, "If God had wanted

1 judges to read footnotes he would have put our eyes in
2 vertically." They don't work for me. So put them in the
3 body of your brief. And they're much easier for me to work
4 with while I'm thinking about your analysis.

5 So if you consider that just a Pechman's peccadillo. So,
6 have good safe travels and look for the opinion. Thank you.

7 (The proceedings recessed.)

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C E R T I F I C A T E

I, Debbie K. Zurn, RPR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 25th day of October, 2013.

/s/ Debbie Zurn

DEBBIE ZURN
OFFICIAL COURT REPORTER